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Supreme Court, U.S.
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No. 96-524

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

I. KEITH YOHN, D.D.S.,
Petitioner,
v.

BOARD OF REGENTS, on behalf of THE UNIVERSITY OF MICHIGAN, *et al.*, the offices and agents thereof; PRESIDENT, JAMES J. DUDERSTADT, PH.D.; PROVOST AND VICE-PRESIDENT FOR ACADEMIC AFFAIRS, ROBERT S. HOLBROOK, PH.D.; DEAN OF THE DENTAL SCHOOL, WILLIAM E. KOTOWICZ, D.D.S.; DEPARTMENT CHAIRPERSON, BRIEN R. LANG, D.D.S.,
Respondents.

On Petition for a writ of Certiorari to the Michigan Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

In the absence of a substantial federal question, may this court exercise jurisdiction in a breach of contract case decided by Michigan Courts?

II.

When the asserted error below consists of allegedly erroneous findings by the state court trial judge or his misapplication of the rule of "inverse condemnation" does Supreme Court Rule 10 admonish against *certiorari*?

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RESPONDENTS' BRIEF IN OPPOSITION

CITATIONS TO OPINIONS BELOW

Opinion of Michigan Court of Appeals, September 26, 1995 (Pet. App. A). Decision of Michigan Court of Claims, August 24, 1992, Judgment of Michigan Court of Claims, September 23, 1992 (Pet. App. B). Order of Michigan Court of Claims, November 10, 1992 (Pet. App. C). Order of Michigan Supreme Court, July 16, 1996 (Pet. App. D). Order of Michigan Supreme Court, August 30, 1996 (Pet. App. E).

CONCISE STATEMENT RE JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1257 (a). However, this is a state law case and does not present a substantial federal question so the court lacks jurisdiction.

STATUTES

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States to drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This Court lacks jurisdiction because the issue is a simple state law breach of contract claim without a substantial federal question.

ARGUMENT

I. THIS COURT SHOULD NOT EXERCISE JURISDICTION OVER A STATE LAW ISSUE IN THE ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION.

Professor Moore put it this way.

> "Where there are both federal and non-federal matters in the case, . . . if the state court decided only the non-federal questions or decides both the federal and non-federal questions, the Supreme Court has no jurisdiction to review if the non-federal ground is adequate to support the judgment." (Citations

omitted). Moore's Federal Practice Second Edition, Volume 12, ¶ 511.01.

He also stated:

> "But the interplay is somewhat different between the Courts *certiorari* jurisdiction over state court judgments under 28 U.S.C. § 1257 and the grant or denial of *certiorari* under the circumstances indicated in Rule 10. Under § 1257 the court does not have any *certiorari* jurisdiction unless the state court judgment is final, rendered by the highest court of the state in which a decision could be had, a federal question is duly raised and adjudicated, is substantial, and the judgment does not rest upon an adequate non-federal ground." (Citations omitted). Moore's Federal Practice Second Edition, Volume 13, ¶ 810.07.)

As Petitioner acknowledges, this case was tried in the Michigan Court of Claims which concluded that Petitioner had failed to prove a *prima facie* case for breach of contract against Respondents. The Michigan Court of Appeals affirmed and further observed that Petitioner's so-called "inverse condemnation" claim failed because he had not proved a property right (contract) which could have been taken from him. See Petition, App. A. The Michigan Supreme Court denied leave to appeal and rehearing, and the opinion of the Michigan Court of Appeals is thus final. It is evident that even if Petitioner's inverse condemnation claim raised a federal question, that question is not substantial and the judgment of the Michigan Courts rests upon a completely adequate non-federal ground, i.e., Petitioner's failure to prove breach of contract. Thus the court lacks *certiorari* jurisdiction under 28 U.S.C. § 1257(a).

II. ALTERNATIVELY, IF THE COURT TAKES JURISDICTION, SUPREME COURT RULE 10 ADMONISHES AGAINST GRANTING *CERTIORARI* UNDER THE CIRCUMSTANCES AT BAR.

Rule 10 says, in pertinent part:

> "A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The grant of *certiorari* would be improvident because Rule 10 describes Petitioner's claims perfectly. Petitioner complains that the trial judge misapplied the rule of inverse condemnation, misapplied Michigan Court Rules and erroneously found that the facts offered by Petitioner at trial did not prove a *prima facie* case for breach of contract. See, e.g., Petition at pp. 13-15.

Moreover, as required by Supreme Court Rule 15.2, Respondents point out numerous misstatements contained in the Petition as follows:

- The document entitled "Principles And Practices Governing Tenure For Faculty Members With Divided Or Partial Appointments" which is quoted at pages 5 and 6 of the Petition was admitted for the very limited purpose of providing that it had been sent to the various deans at the University of Michigan (Trial Trans 92) and that Petitioner had made a Freedom of Information Act request for it (Trial Trans 163). Even if it had been admitted without qualification, however, the document would not prove Petitioner's case because by its terms it applies to dismissals or reductions in rank, i.e., the level of appointment, not to the simple change in work schedule at issue in this case. Furthermore, the record contains no proof that the document was even adopted as university policy, as the trial judge correctly found (Trial Trans 163).

- The Petition contains several references to Petitioner's alleged ". . . sacrifice of substantial bargained for private practice income . . . ." (Petition, pp. 7, 8). The trial record, however is devoid of such proofs.
- Similarly, Petitioner's claim that "the understanding between the parties was the Petitioner would enjoy the protected vested property rights in the terms of his University appointment with tenure until retirement" is unsupported by anything in the record. It was for this reason in part that the trial court held that Petitioner had failed to prove a *prima facie* case for breach of contract.
- Petitioner has failed to mention that he initially brought this case in the Federal District Court for the Eastern District of Michigan (No. 90-CV 72073-DT) under 42 USC § 1983 and that on May 23, 1991 the Honorable Bernard A. Friedman granted summary judgment in favor of Respondents.
- Finally, Respondents do not understand Petitioner's assertion at page 13 of the Petition that "Respondents' counsel presented over 15 exhibits to the court." Although premarked joint exhibits were offered by Petitioner, Respondents presented no exhibits to the trial court; instead the case was decided on Respondents' motion for dismissal at the conclusion of Petitioner's proofs.

CONCLUSION

The Petition for *certiorari* must be denied.

Respectfully submitted,

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October 29, 1996